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No. 85-206

IN THE

Supreme Court of the United States

October Term, 1985

JOE PASCARELLA,
Petitioner,
v.
STATE OF NEW MEXICO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When New Mexico Courts Use the Massachusetts Procedure for Deciding Voluntariness of a Confession, Can the Trial Court's Ruling on Voluntariness Be Determined from the Record Absent an Explicit Finding?

2. Were the Jury Instructions Adequate to Instruct the Jury on the Elements of Solicitation of Felony Aggravated Battery?

3. Did Defense Counsel's Request for a Definitional Instruction Provide Effective Assistance of Counsel?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, State of New Mexico, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the denial of a petition for writ of certiorari in the New Mexico Supreme Court and of the Memorandum Opinion of the New Mexico Court of Appeals in this case.

STATEMENT OF THE CASE

The defendant was charged with solicitation of felony aggravated battery (R. at 1), after he hired David Garcia to injure his employer. Unbeknownst to the defendant, Mr. Garcia was an undercover law enforcement officer (Tape 3, 317, 329), and the defendant's telephone conversations and meetings with this ostensible hit man were tape recorded. (Tape 3, 396, 450, 483, 566, 719, 800; Tape 4, 35). After the defendant was arrested, he made inculpatory statements to Officer Darrell Allred.

Officer Allred testified at trial that the defendant was twice advised of his rights, that the defendant stated he would talk to the police, that he didn't need an attorney, and that he understood his rights. (Tape 7, 86, 108). Defense counsel approached the bench, and after an inaudible bench conference, the trial court dismissed the jury for the day. The court then told defense counsel, "Outside the presence of the jury, you may voir dire the witness, Mr. Pickett, as to voluntariness of the statement." (Tape 7, 135). On voir dire, Officer Allred stated that the defendant was twice advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 694 (1966) (Tape 7, 150, 175). Officer Allred testified he asked the defendant if he understood his rights and the defendant stated that he did, that he had given them to people himself. (Tape 7, 185). (The defendant had been a police officer. (Tape 8, 381)). Officer Allred stated that he did not tell the defendant that he or any officer would determine whether the charge would be a misdemeanor, or that if the defendant cooperated that there was a good possibility he would only be charged with a misdemeanor. (Tape 7, 232). After the defendant had made inculpatory statements to the police, Officer Allred asked if he would agree to repeat those statements on a tape recording. At that point, the defendant stated that he wanted to talk to an attorney. (Tape 7, 302).

After the voir dire, the court adjourned for the day. (Tape 7, 341). The next day, direct examination of Officer Allred continued. (Tape 7, 352). Before questioning began on the substance of the defendant's statements, the following exchange occurred:

> [Defense Counsel]: Your honor, again I would object to this officer testifying to any conversation that he had with Mr. Pascarella. I make that objection at this time on the grounds that he was improperly advised of his rights, and for those reasons that I raised with the court yesterday.
>
> Judge Galvan: That it was not a voluntary statement.
>
> [Defense Counsel]: That's correct, your honor.
>
> Judge Galvan: The voluntariness of the statement will be considered by the jury, and the objection is overruled at this time. You may proceed.

(Trial Tape 7, 372). Officer Allred then proceeded to testify about statements made by the defendant.

Later in the trial, the defendant testified that he had been advised of his rights. (Tape 9, 317). He stated that Officer Allred told him that the charge could be a misdemeanor or a felony, and if he demonstrated sufficient remorse, Officer Allred would do what he could, or push, for a misdemeanor charge. (Tape 9, 369; Tape 10, 327). He also stated that Officer Allred told him that if he came across as if he "wanted" the victim, then he'd be hung. (Tape 9, 376).

On the remaining issues pertaining to jury instructions and ineffective assistance of counsel, the central fact is that the defendant requested jury instruction No. 4. (Petition, Appendix at 7). That instruction stated:

> In New Mexico there is a lesser degree of simple aggravated battery when the injury does not amount to great bodily harm, but which injury, although not likely to cause death or great bodily harm, does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body.

(R. at 46).

ARGUMENT

1. The Trial Court Made a Sufficient Determination of Voluntariness of the Defendant's Statement.

The defendant claims that a line of New Mexico cases, including the present one, fails to comply with the standards for determining voluntariness set out in *Sims v. Georgia*, 358 U.S. 538 (1967). The defendant faults the New Mexico cases, because they do not require an explicit finding of voluntariness by the trial court before submitting the issue to the jury.

This Court, in *Jackson v. Denno*, 378 U.S. 368, 377 (1964), held that a trial judge must determine a confession to have been voluntarily given prior to submitting it to the jury. The Count approved two procedures. Under the Massachusetts rule, the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused. Under the orthodox rule, the judge solely and finally determines the voluntariness of the confession. In both cases, the judge's conclusions are "clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record." *Id.* at 378-79. The Court elaborated on the procedure in *Sims*, stating that while the judge "need not make formal findings of fact or write an

opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." 358 U.S. at 544. Since *Sims*, this Court has approved voluntariness determinations which were not explicit, but which were clear from the record. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 397 n.12 (1978); *Swenson v. Stidham*, 409 U.S. 224, 230 (1972).

As suggested in *Jackson*, lower courts have stated that when a jurisdiction follows the Massachusetts or orthodox procedures, a determination of voluntariness is inherent in the overruling of a defendant's objection to a confession on voluntariness grounds. *Martinez v. Estelle*, 612 F.2d 173 (5th Cir. 1980); *United States v. Medina*, 552 F.2d 181 (7th Cir.), *cert. denied*, 434 U.S. 839 (1977); *Erving v. Sigler*, 453 F.2d 843 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972). Also, courts are willing to find an implicit determination of voluntariness in a trial court's overruling of an objection when that trial court has been squarely presented with the issue of voluntariness. *Medina*, 552 F.2d at 185; *United States v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); *Cranford v. Rodriguez*, 512 F.2d 860 (10th Cir. 1975). When the purpose of the hearing to suppress the confession is to determine its voluntariness, "[t]he trial judge unmistakably makes a determination that the confession was voluntary by his ruling denying suppression". *United States v. Garrett*, 521 F.2d 444, 447 n.3 (8th Cir. 1975).

New Mexico courts have clearly adopted the Massachusetts procedure for determining voluntariness. *Pece v. Cox*, 74 N.M. 591, 396 P.2d 422 (1964); *State v. Burk*, 82 N.M. 466, 483 P.2d 940 (Ct.App.), *cert. denied*, 404 U.S. 955 (1971). They also require that the judicial determination of voluntariness be explicitly stated or ascertainable from the record. *State v. Burk*, 82 N.M. at 470. The fact that New Mexico courts have found an implicit determination of voluntariness when the trial court overrules the defendant's objection and allows the issue to go to the jury is in accord with *Jackson* and its progeny. *See State*

v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968); *State v. Beachum*, 78 N.M. 390, 432 P.2d 101 (1967), *cert. denied*, 392 U.S. 911 (1968); *State v. Stout*, 82 N.M. 455, 483 P.2d 510 (Ct.App. 1971).

In this case, the issue of voluntariness was squarely presented to the trial court. The New Mexico Court of Appeals found that the trial court's overruling of the defendant's objection and its decision to send the issue to the jury evidenced a determination of voluntariness by the trial court. (Petition, Appendix at 11-12). That court noted that the defendant did not request clarification of the trial court's ruling. *See United States v. Medina*, 552 F.2d at 185; *United States v. Gardner*, 516 F.2d at 340.

The defendant limits his challenge on this issue to an allegation that New Mexico courts do not accept the requirement in *Sims* that a judicial determination of voluntariness must be unmistakably clear from the record. However, New Mexico cases show that New Mexico courts have adopted the requirement of a judicial determination of voluntariness before submitting the question to a jury, and they have held that that determination must be either explicitly stated or ascertainable from the record. There is no conflict between New Mexico case law and the Court's rulings in *Jackson* and *Sims*.

This Court should not consider this issue, because there is no discrepancy between *Sims* and the New Mexico decisions in this case and in previous cases. Additionally, this case does not raise any issue that has not already been addressed by this Court in both *Jackson* and *Sims*. Finally, the facts of this case do not provide a compelling basis for further comment on this area of the law. The defendant does not challenge the fairness of the ruling on voluntariness; he argues only that the ruling lacked definitiveness. Under the facts of this case, the ruling on voluntariness was sufficient, and the defendant requested nothing further. The New Mexico Court of Appeals recognized and correctly applied the requirements of *Jackson* and *Sims*.

2. The Jury Was Adequately Instructed on Solicitation of Aggravated Battery.

In New Mexico, solicitation is a crime only when the solicited act constitutes a felony. N.M.Stat.Ann. § 30–28–3(E) (Repl. Pamph. 1984). The defendant was properly charged with solicitation of felony aggravated battery. The defendant claims that the jury instructions did not adequately inform the jury that it could only convict the defendant of solicitation of felony aggravated battery, as opposed to solicitation of misdemeanor aggravated battery. The defendant also claims that the jury was not told of this distinction. (Petition at 14).

The element that distinguishes felony aggravated battery from misdemeanor aggravated battery is the requirement of great bodily harm. N.N.Stat.Ann. § 30–3–5(B) and (C), (Repl. Pamp. 1984). The trial court gave the following instructions on the elements of the crime:

> **Instruction Number 1**
>
> For you to find the defendant guilty of criminal solicitation, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant intended that another person commit aggravated battery;
>
> 2. The defendant employed the other person to commit the crime.
>
> 3. This happened in New Mexico on or about the 5th day of May, 1983.
>
> **Instruction Number 2**
>
> In New Mexico, the elements of the crime of aggravated battery are as follows:
>
> 1. Injury is done to a victim;

2. The injury is done intentionally;

3. The injury amounts to great bodily harm.

(R. at 43, 44).

These instructions required the jury to find that the defendant solicited another person to do great bodily harm to the victim. In other words, the jury had to convict the defendant of solicitation of the felony form of aggravated battery.

The trial court also gave the jury an instruction on the definition of great bodily harm and an instruction on the definition of the lesser type of aggravated battery:

> **Instruction No. 3**
>
> Great bodily harm means an injury to a person which creates a high probability of death or results in serious disfigurement or results in loss of any member or organ of the body or results in permanent or prolonged impairment of the use of any member or organ of the body.
>
> **Instruction No. 4**
>
> In New Mexico there is a lesser degree of simple aggravated battery when the injury does not amount to great bodily harm, but which injury, although not likely to cause death or great bodily harm, does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body.

(R. at 45 and 46).

There are three reasons why this Court should not consider this issue: 1) it was not preserved for review; 2) the defendant's claims about the issue are unfounded; and 3) the situation out of which the issue arose is idiosyncratic.

1. The defendant concedes that he did not object to the instruction. (Petition at 14). In fact, the defendant requested Instruction No. 4, which is the only instruction which even mentions the misdemeanor form of aggravated battery. On appeal, the New Mexico Court of Appeals held that the defendant did not preserve the issue for review, because he did not object, and because the instructions given did not cause jurisdictional or fundamental error. (Petition, Appendix at 4–5). In discussing its reasons for finding that the instructions did not give rise to either jurisdictional or fundamental error, that court reached the merits of the instruction issue. However, the crux of that court's holding was that the issue was not preserved for review. This Court should decline to consider this issue on the basis that the decision of the New Mexico Court of Appeals was based on adequate state grounds, which was the failure to preserve the issue.

2. The defendant's claim that the jury instructions would have allowed the defendant to be convicted of solicitation of misdemeanor aggravated battery is not supported by the record. Instructions 1 and 2 were the elements instructions in this case. When those two instructions are read together, it is clear that the jury was required to find as essential elements of the crime that the defendant employed another person to intentionally injure the victim, and that the intended injury had to amount to great bodily harm. The subsequent Instructions 3 and 4 explain the type of injury that constitutes great bodily harm and the type of injury that does not amount to great bodily harm. They are correct definitions of the two types of injury.

In addition, during closing argument both parties discussed the distinction between great bodily harm and a lesser type of injury. The defendant used the definitions in Instructions 3 and 4 to argue that the jury had to acquit the defendant if it determined that the intended harm to the victim did not amount to great bodily harm. (Trial tape 12, 337).

The instructions properly instructed the jury on the essential elements of solicitation of felony aggravated battery. There was substantial evidence to support each element, including great bodily harm. There was no provision in the instructions which would have allowed the jury to convict the defendant of solicitation of misdemeanor aggravated battery.

3. The instructions are idiosyncratic to this case, and would not likely recur in another case. Instruction 4 would not ordinarily be given in a similar type of case, and was only given in this case because the defendant requested it. Consideration of this issue would not develop law in a recurring problem area, but would be limited to the factual pattern of this case.

This Court should not hear an issue in which the defendant complains about a jury instruction which he requested, which was not preserved for review, which did not prejudice or harm the defendant in any way, and which is limited to the specific facts of this case.

3. Defense Counsel Provided Effective Assistance of Counsel.

The defendant points to only one instance of conduct by defense counsel on which he bases his claim of ineffective assistance of counsel. He argues that defense counsel rendered per se ineffective assistance of counsel when he tendered Instruction 4. This argument is based on the premise that the giving of Instruction 4 allowed the defendant to be convicted of solicitation of misdemeanor aggravated battery, which is not a crime. That premise is unfounded. As discussed in Point II, Instruction 4 did not allow the jury to convict the defendant of solicitation of misdemeanor aggravated battery. The elements instructions clearly required that the jury find great bodily

harm as an element of the solicited aggravated battery, which would make it felony aggravated battery.

This issue does not warrant the Court's attention. First, defense counsel was not ineffective by requesting Instruction 4. Instruction 4 did nothing more than describe to the jury the type of injury that did not amount to great bodily harm. One theory of defense at trial was that the type of harm solicited by the defendant did not amount to great bodily harm. He requested the instruction to make sure that the jury understood the difference between great bodily harm and a lesser type of injury. The instruction accomplished that purpose. It did not alter the elements instructions, or allow the jury to convict the defendant of noncriminal conduct. It also did not so confuse the jury that it could not properly apply the elements instructions. The request for Instruction 4 was reasonable conduct by defense counsel in furthering his theory of defense, and that conduct did not prejudice the defendant. The request for Instruction 4 did not establish ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S.___, 104 S.Ct. 2052 (1984).

Another reason the Court should not consider this issue is that, given the issues as framed by the defendant, effectiveness of counsel is not dispositive. If the Court finds that the jury instructions adequately instructed on the crime charged, then there is no basis for a claim of ineffective assistance of counsel. If this Court were to find that the instructions were inadequate on the essential elements, then that situation would be determinative, regardless of who tendered the instructions.

CONCLUSION

The Petitioner has not stated any issues which warrant con-

sideration by this Court. This Court should deny the petition for certiorari.

Respectfully submitted,

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